

89-1092

Supreme Court

DEC 6 1989

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

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MICHAEL HIGGINS,

Petitioner,

vs.

LEO T. MAHER, an  
individual; LEO T.  
MAHER, Roman Catholic  
Bishop of San Diego,  
a corporation sole;  
THE ROMAN CATHOLIC  
DIOCESE OF SAN DIEGO,  
a corporation; DOES  
1 through 100,  
inclusive,

Respondents.

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEAL OF THE STATE OF CALIFORNIA,  
FOURTH APPELLATE DISTRICT, DIVISION ONE

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December 26, 1989



## QUESTIONS PRESENTED

1. Is access to the Civil Courts for resolution of private disputes a Right which is guaranteed under the Constitution?

2. Does refusal of a Civil Court to address the merits of a complaint on the ground that to do so would violate the First Amendment to the Constitution constitute a denial of access to the Civil Courts?

3. Does denial of access to the Civil Courts on the ground that the Plaintiff belongs to a certain class<sup>1</sup> constitute a violation of the equal protection guaranteed by the 14th Amendment to the Constitution?

4. Does the use of the First Amendment "establishment of Religion" clause to deny a plaintiff access to the Civil Courts require a detailed analysis of whether the facts of the case give rise to a compelling State interest in denying such access? Has such an interest been sufficiently demonstrated in the present case?

1. Priests of an Established Church.



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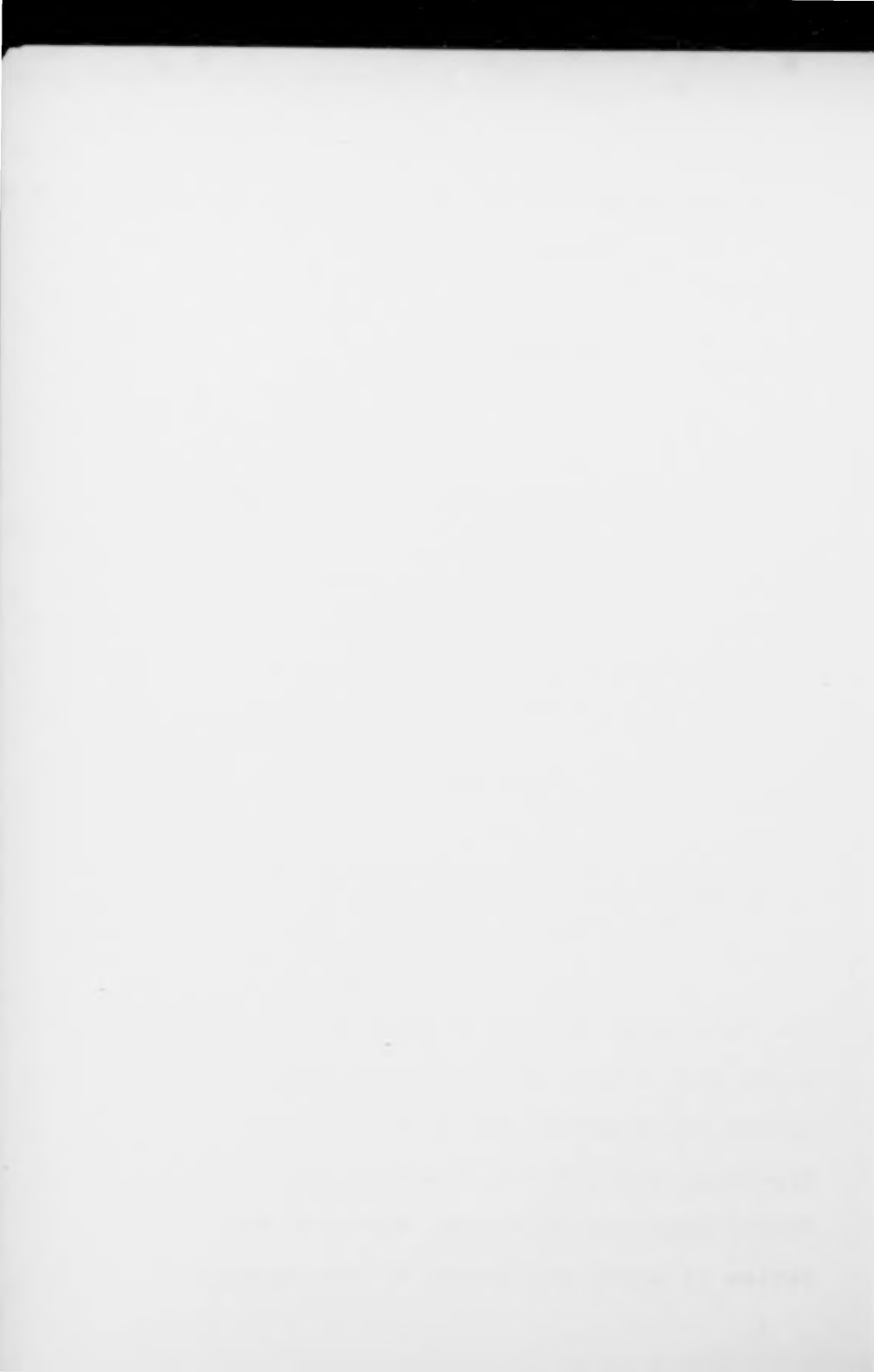
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PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEAL OF THE STATE OF CALIFORNIA,  
FOURTH APPELLATE DISTRICT, DIVISION ONE

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The Petitioner Michael Higgins respectfully  
prays that a writ of certiorari issue to  
review the judgment and opinion of the  
Appellate Court of the State of California,  
Fourth Appellate District, Division One,  
review of which was denied by the Supreme



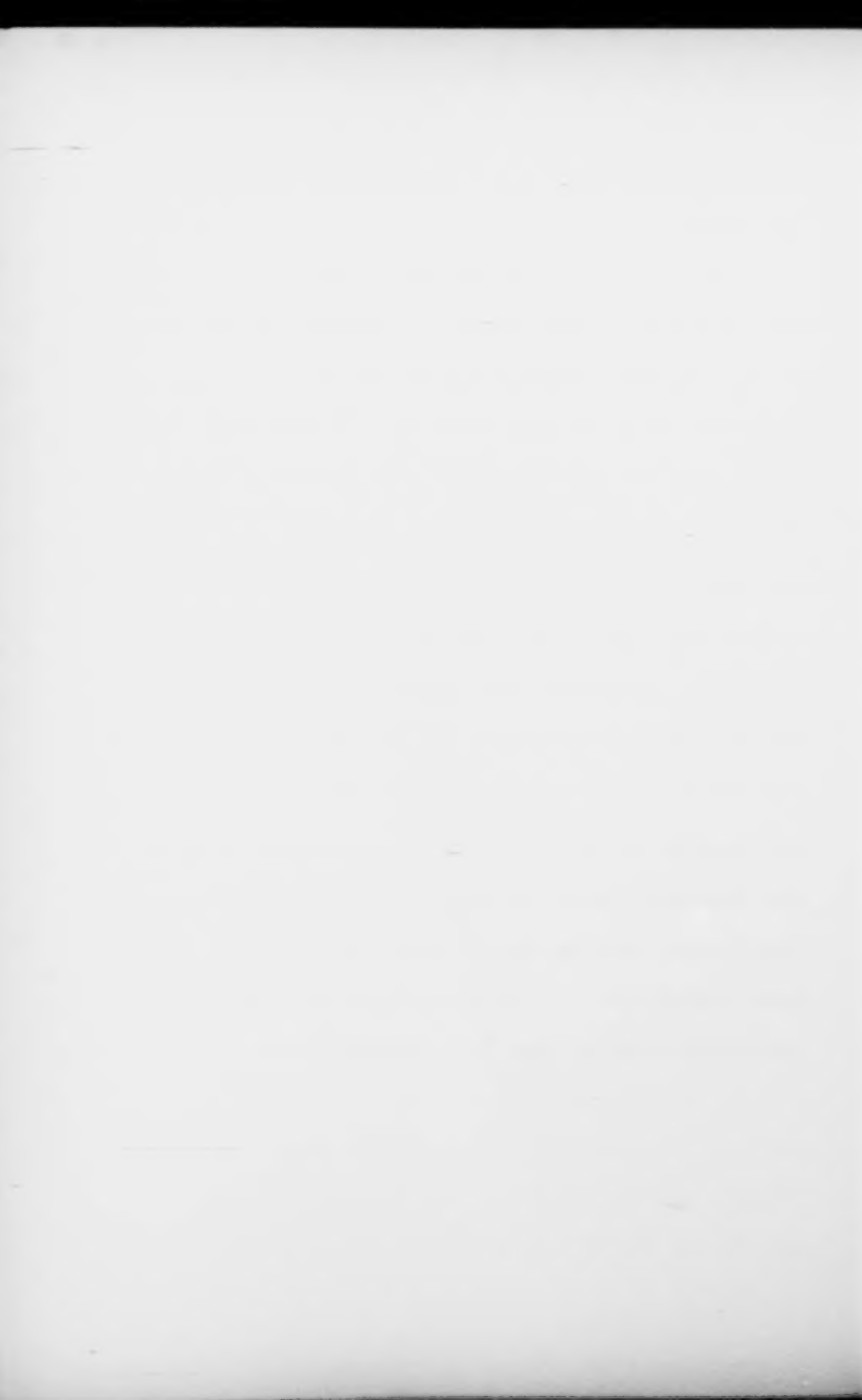
Court of the State of California on August 10, 1989.

#### OPINIONS BELOW

The opinion of the Appellate Court of the State of California, Fourth Appellate District, Division One, is reported at 210 Cal.App.3d 1168, and is reprinted in the appendix hereto, pg. 1a, *infra*.

The Denial of the petition for rehearing before the Appellate Court of the Fourth District, Division One (Todd, acting P.J.) has not been reported. It is reprinted in the appendix hereto, pg. 20a, *infra*.

The denial of the petition for review before the Supreme Court of the State of California (Eagleson, acting Chief Justice) has not been reported. It is reprinted in the appendix hereto, pg. 21a, *infra*.



## JURISDICTION

The jurisdiction of this Court to review the judgment and decision of the Appellate Court of the State of California, as affirmed by the Supreme Court of the State of California, is invoked under 28 U.S.C. § 1257(3).

On October 30th, 1989, Justice O'Connor ordered that the time for filing this petition for a writ of certiorari be extended to and including December 8, 1989.

On December 8, 1989 filing of the instant petition was attempted with the Clerk of the Court, but was refused due to the Clerk finding that the format used was incorrect.

The present petition is filed pursuant to Supreme Court Rule 33.7.

## CONSTITUTIONAL AMENDMENTS INVOLVED

Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to





assemble, and to petition the Government for a redress of grievances.

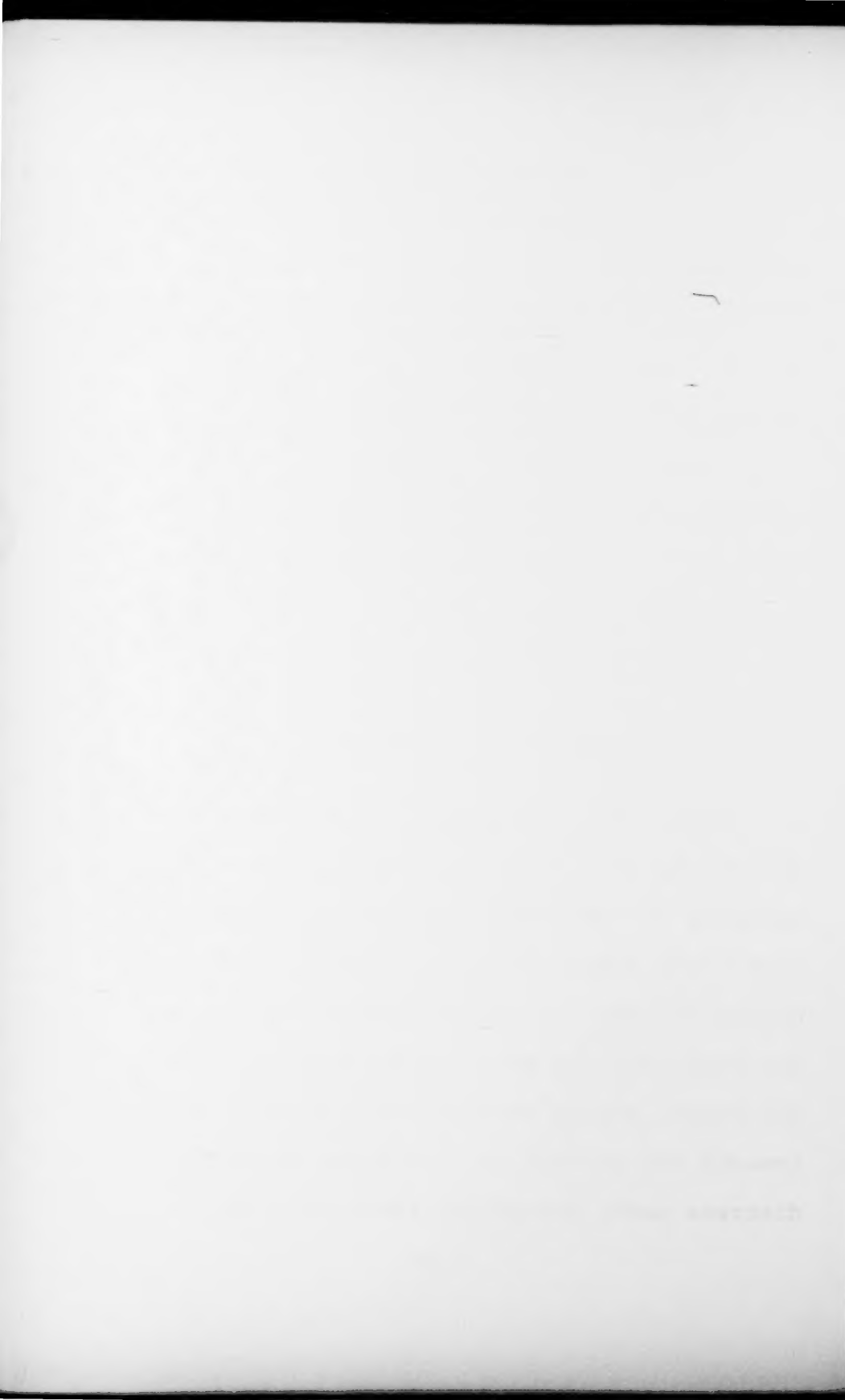
Amendment XIV:

Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is a Roman Catholic Priest.

In 1987 he instituted this damage action, sounding in contract, intentional and negligent tort. The complaint alleged that, in the early months of 1987, the Roman Catholic Bishop of San Diego and the Roman Catholic Diocese of San Diego, acting through their agents, defamed, invaded the privacy of, inflicted emotional distress upon, wrongfully terminated and



breached the implied covenant of good faith and fair dealing with the Petitioner.

The allegations involved activities whereby the Respondents instituted a rumor campaign against the Petitioner wherein it was falsely asserted that the Petitioner had engaged in homosexual conduct and that the Petitioner had physically assaulted other persons.

Information was also released concerning past psychiatric treatment which the Petitioner had undergone. This psychiatric information was confidential. The Petitioner did not give any permission for the release of the psychiatric information. The nature of the information released, that the Petitioner had been diagnosed as a schizophrenic and had undergone electroshock treatment<sup>2</sup>, was of such a nature that damage to the reputation of the Petitioner in the Community should have been assumed to be the reasonable result of publishing such information.

2. The diagnosis was performed by an individual who was unlicensed to practice psychiatry, and who later admitted in writing to Respondent Maher that he had made a mistake in his diagnosis.



In fact the reputation of the Petitioner, both within and without the Church, did suffer damage as a result of these rumors and unauthorized publications of confidential information.

In addition, the Petitioner suffered and continues to suffer emotional distress as a result of the aforesaid publications.

Coincidentally, just prior to the beginning of the aforesaid rumor campaign, the Petitioner had been wrongfully prevented from exercising his Priestly faculties within the Diocese of San Diego. The Bishop of San Diego, through his agents, caused other persons within the Diocese to understand that the Petitioner was not authorized to say Mass or to otherwise act as a Priest within the Diocese. Such a suspension of Priestly faculties is tantamount to a termination of employment within the Church. This action was performed by the Bishop of San Diego for improper purposes. The intent of the action was solely to damage the Petitioner. There was no justification for this action within the procedures established by the Roman



Catholic Church.

Upon the foregoing facts the Petitioner alleged that he had been defamed. That his privacy had been invaded. That he had been wrongfully terminated in violation of his contract with the Diocese and that the bad faith behind the termination breached the implied covenant of good faith and fair dealing. Finally, he alleged that all these acts had caused him emotional distress.

The Respondents demurred to the complaint. In so doing, under California case law, they admitted for the purpose of deciding the demurrer that all the allegations of the complaint were true.

The Demurrer was based on the premise that the First Amendment to the Constitution of the United States prohibits civil Courts from exercising jurisdiction over disputes arising within an established Church, such as the Roman Catholic Church. The Respondents argued that to exercise jurisdiction over such questions

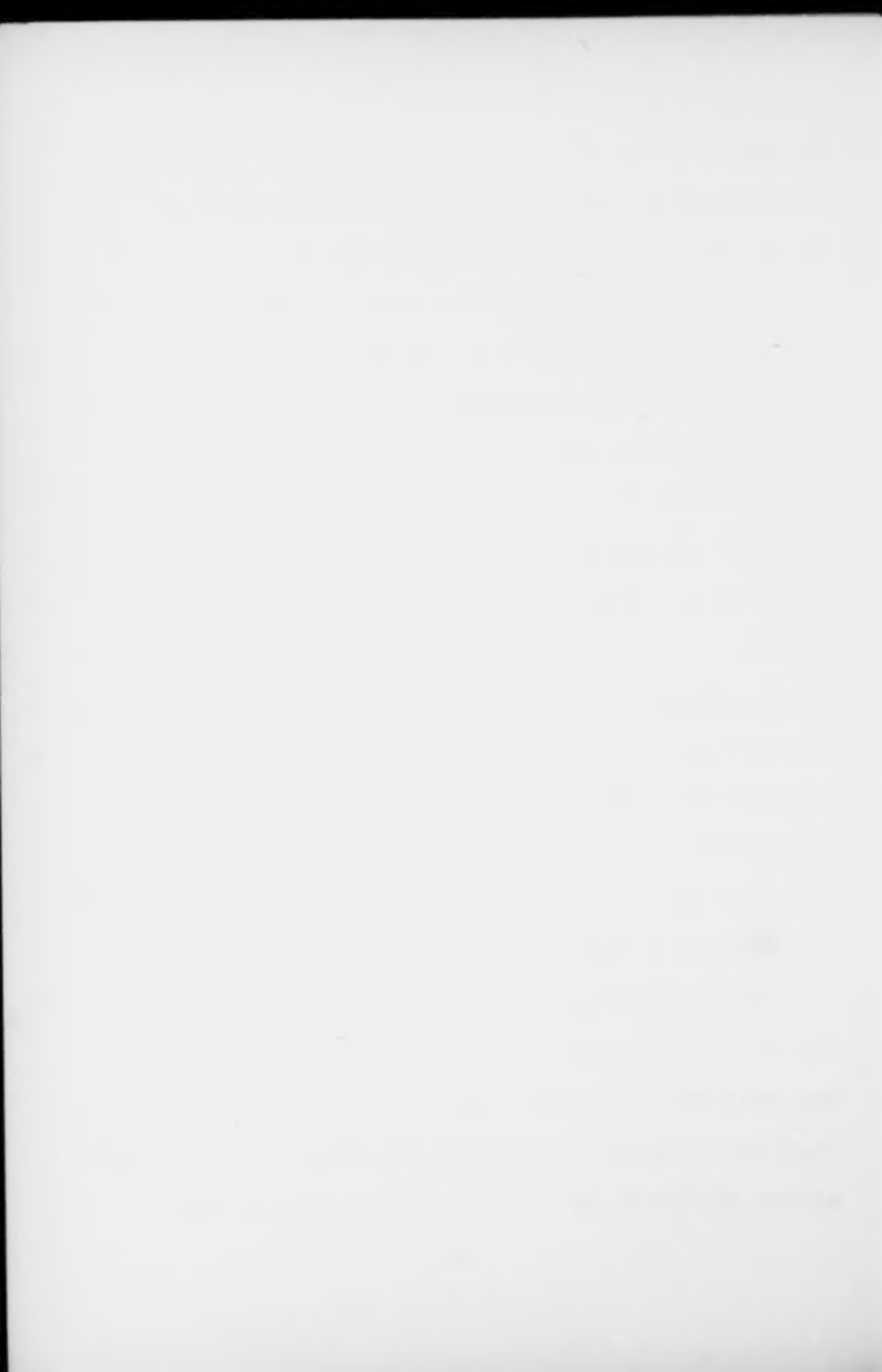




as were presented by the Petitioner would impermissably infringe upon the separation of Church and State and would result in a "chilling" effect upon the exercise of Religion, contrary to the intent expressed in the First Amendment. The Respondents further argued that in the present case there could be no question but that the actions complained of were an "ecclesiastical" dispute, because they involved a controversy between a Priest and his Bishop. It was argued that the mere fact of the positions held by the litigants within the Church hierarchy identified the suit as a purely "ecclesiastical" dispute not fit for adjudication before the civil Courts.

The Trial Court agreed with the Respondents and dismissed the suit for lack of jurisdiction.

The Petitioner appealed. He conceded that the portion of the suit sounding in contract was outside civil jurisdiction, due to the fact that by voluntarily joining the Church he had agreed to abide by the rules and regulations of



the Church. Any contractual relationship he had with the Church, being voluntary, would therefore come under such rules and regulations and could for that reason be classified as a purely "ecclesiastical" matter outside the jurisdiction of the civil authorities. The Petitioner further recognized that the act of terminating a Priest, being an administrative act within the Church, is so wound up with Church structure as to be inseparable from other aspects of the Church involving religious belief. For this reason it was proper for the civil authorities to decline to exercise jurisdiction over the question of whether a Priest was hired or fired improperly since to adjudicate the matter would involve determinations of whether the religious beliefs of the Church were proper or improper.

However, the Petitioner argued that the other actions complained of were intentional torts committed with malice. Due to the alleged malicious intent these actions could not be construed as having had a "religious"



motivation. The nature of these acts took them outside of any activities which the Courts could properly regard as "ecclesiastical".

Defamation and invasion of privacy are simply not legitimate Church functions. For the Court to find that such activities are outside civil jurisdiction because they might be based on legitimate religious beliefs which may not be adjudicated because of First Amendment concerns would require that the Court find, in effect, that defamation and invasion of privacy are legitimate Church functions. Such a conclusion flies in the face of logic.

The Petitioner also argued that the mere fact he had voluntarily joined the Church did not mean he had consented to any sort of act the Church or its hierarchy might choose to perform against him. His consent was limited solely to foreseeable types of action and discipline, such as are established by Church procedure and usage. The Petitioner did not, by consenting to abide by the rule of the Church, consent to suffer activities performed outside

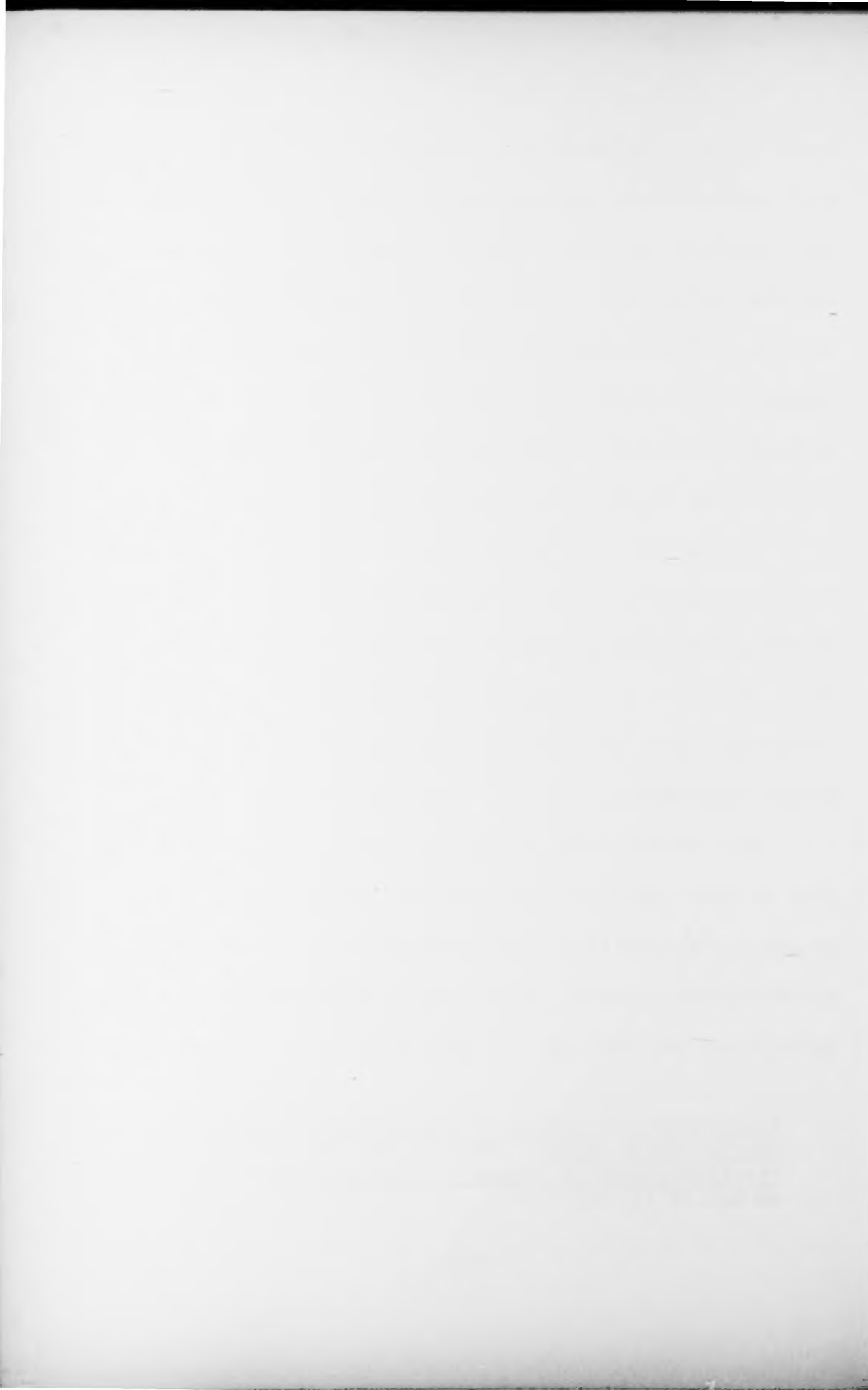


that rule. Defamation, invasion of privacy, and intentional infliction of emotional distress are plainly not the types of activity sanctioned by the rules and usage of the Roman Catholic Church. The voluntary nature of the Petitioner's association with the Church can have had no effect upon the liability of the Respondents for performing such intentionally tortious actions.

Given the non-ecclesiastical nature of the intentional torts set out in the complaint, the Petitioner argued that the exercise of jurisdiction over their adjudication could not infringe upon any protections extended by the First Amendment.

The Petitioner also cited California case law to the effect that jurisdiction may be properly exercised over disputes involving an established Church, even where questions of religious belief may be involved<sup>3</sup>, if a question

3. Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church (1952) 39 Cal.2d 121, 131; Providence Baptist Church v. Superior Court (1952) 40 Cal.2d 55, 60.





of the violation of the Plaintiff's Constitutional Rights is raised.

The Plaintiff did raise the question of whether his Constitutional Rights were being violated, and asked the Appellate Court to consider if the exercise of jurisdiction would be proper if only to adjudicate whether those rights were being violated.

The Appellate Court rejected the Petitioner's argument. While it recognized that the intentional acts complained of, taken by themselves, would be sufficient to confer civil jurisdiction even though the Petitioner was a Priest and one of the Respondents was his Bishop, it found that other facts of the case indicated that the defamation and invasion of privacy were performed by the Bishop as "part and parcel" of his administrative functions, and that therefore these acts took on the "privileged aura" of otherwise legitimate ecclesiastical acts. Because of this the Appellate Court found that jurisdiction was properly denied over adjudication of the case.



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The Appellate Court found that to adjudicate the questions of whether the Respondents defamed, invaded the privacy of, or intentionally inflicted emotional distress upon the Petitioner would infringe upon the freedom of the Roman Catholic Church to conduct its own ecclesiastical affairs without interference from the power of the State.

It should be noted that the Appellate Court failed entirely to address in its opinion the question of whether Constitutional rights were involved or violated in this matter.

Thereupon the Appellate Court upheld the dismissal of the action for want of jurisdiction.

The Petitioner applied for rehearing. The application was denied without comment.

The Petitioner thereupon petitioned the Supreme Court of the State of California for review. Review was denied on August 10, 1989.

The present Petition follows.



## REASONS FOR GRANTING THE WRIT

### I

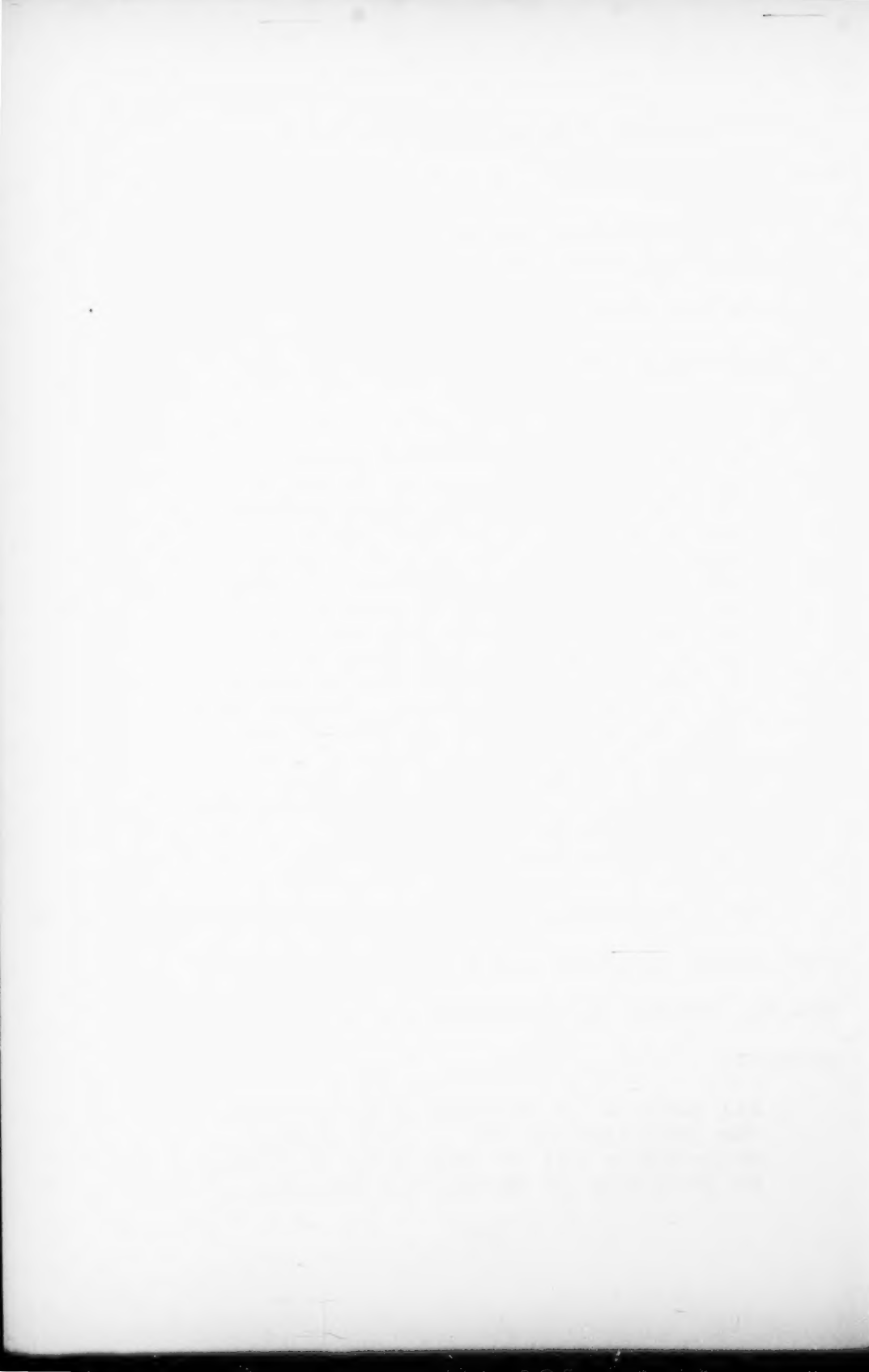
The Petitioner Has A Constitutional  
Right of Equal Access to the Courts

As was observed by this Court in the case  
of Missouri v. Lewis (1879) 101 U.S. 27; 25 L.Ed.  
989:

"It is the right of every State to establish such Courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate Courts for redress."

California Courts have also recognized that there exists a right of access to the Courts, beyond the requirements of criminal process:

All persons in California have "under the Constitution the ...full power accorded to all of appearing in person to prosecute or defend all actions..."



A person has a right to personally appear "in a Court of Justice in pursuit or defense of a Constitutional right - whether of person or property."

- O'Connell v. Judnich (1925) 71 Cal.App. 386; 235 P. 664.

It is clear that the equal protection under the laws guaranteed by the Fourteenth Amendment includes the right of access to the Civil law courts for the resolution of personal disputes.

## II

By Refusing To Address the Merits Of The Petitioner's Complaint The Civil Courts Have Effectively Denied The Petitioner Access To The Courts.

The right of access to the Courts is not encompassed in the mere ability to stand before the Court only to have the Court tell the individual that it will not adjudicate his case.

This question was addressed by Boddie v. Connecticut (1971) 91 S.Ct. 780; 401 U.S. 371; 28 L.Ed.2d 113.

In that case access was denied to a Plaintiff seeking to bring a divorce action.





The denial was based on inability to pay the required filing fee. This Court found that the denial violated due process:

"A State may not, consistent with the obligations imposed on it by the Due Process clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." (Pg. 789 S.Ct.)

The denial of access in that case consisted of the Court telling the Plaintiff, in effect, that it would not consider whether the Plaintiff's complaint had merit if the Plaintiff could not pay the filing fee.

The present case differs in detail, but not effect. The denial of access here is based on jurisdictional concerns. The denial in Boddie was based on inability to pay. But the effect on the Plaintiff in both instances is the same: The case is not heard on its merits.

It is the effect of not being able to get a hearing on the merits which constitutes the denial of access.

Whether the denial in and of itself had



merit is another question. In Boddie the analysis of the merit of the denial turned on the subject matter of the complaint and the inability to pay the filing fee. Whether the denial in the instant case was merited is also a function of the nature of the case and the cited reason for the denial.

But it is clear that a denial of access to the Courts occurs when the Court, for whatever reason, refuses to consider a complaint on its merits.

There has been a denial of access to the Courts in the present case due to the fact that the Courts have declined to consider the merits of the Plaintiff's complaint.

### III

In Denying the Petitioner Meaningful Access to the Courts the State Has Invaded the Petitioner's Right To Equal Protection Under the Law. To Justify State Action Which Violates the Right To Equal Protection A Compelling State Interest Should Be Demonstrated.

It is axiomatic that the Fourteenth



Amendment requires the laws to be applied to all classes equally, and that no class of persons be singled out for a different application of the law unless the State has a demonstrable, and in some instances compelling, reason for doing so.

That we are here dealing with an action by the State, comparable to the enactment of legislation in it's 14th Amendment ramifications, is apparant:

"Judicial action is to be regarded as action of the State for the purposes of the 14th Amendment."

-Shelley v. Kraemer (1948 U.S. Mo.)  
68 S.Ct. 836, 843; 334 U.S. 1;  
92 L.Ed. 1161

The Judicial action by the lower Courts in refusing to examine the Petitioner's claims upon their merits and in thereby denying him his Constitutional right of access to the Courts was clearly a State action for the purposes of the 14th Amendment.

If the record of this case is examined, it is apparant that the Courts found no jurisdiction because the Petitioner belongs to a particular



class of persons: Priests of an established Church. It is clear from the opinion of the Appellate Court that the Petitioner's complaint was:

"plain and direct in terms of accusing the Bishop and other Church hierarchy of unwarranted and malicious conduct which caused him severe damage. Had these allegations been set forth without the preamble showing their genesis in the priest-bishop relationship, it is doubtful they could have been dismissed on demurrer."

-Ppg. 16a\_ of the original Appellate Opinion.

The Appellate Court could not have been clearer that it was basing it's denial of jurisdiction on the fact that the Petitioner was a Priest, a member of a particular class of persons.

Due to the fact that the Appellate opinion is now published case law exercising *Stare Decisis* in California, this particular denial of access which is constituted by the refusal to exercise jurisdiction is now applicable to an entire class of persons in the State of California. The effect on that class of persons has the same





impact as if it had been brought about by enacted legislation.

This Court is therefore now presented with a situation where the State of California has taken action to deny an entire class of persons access to the Courts of that State with regard to an entity whom that class has such an intimate and daily relationship with that there is a great likelihood such prohibited causes of action as were addressed by the Petitioner will arise again between members of the class and that entity. The Constitutional right of that class of persons, Priests, of access to the Courts has thus been infringed by State action unequally under the law.

The Petitioner's personal rights of equal treatment under the law have also been infringed by the State action, precisely because he is a member of the targeted class.

This Court has previously addressed such questions as whether State action barring equal access to the Courts on economic grounds violates the 14th Amendment. In the context



of the Boddie case, supra, it was found that such action violated due process requirements.

It has also been long recognized that State action which discriminated against a class of persons based upon their religious affiliation violates the equal protection requirements of the 14th Amendment.

Both access to the Courts and freedom of religion have been recognized as substantial, basic rights, and State action infringing these rights must be supported by demonstration of a compelling State interest which cannot be economically served in some other, less intrusive manner.

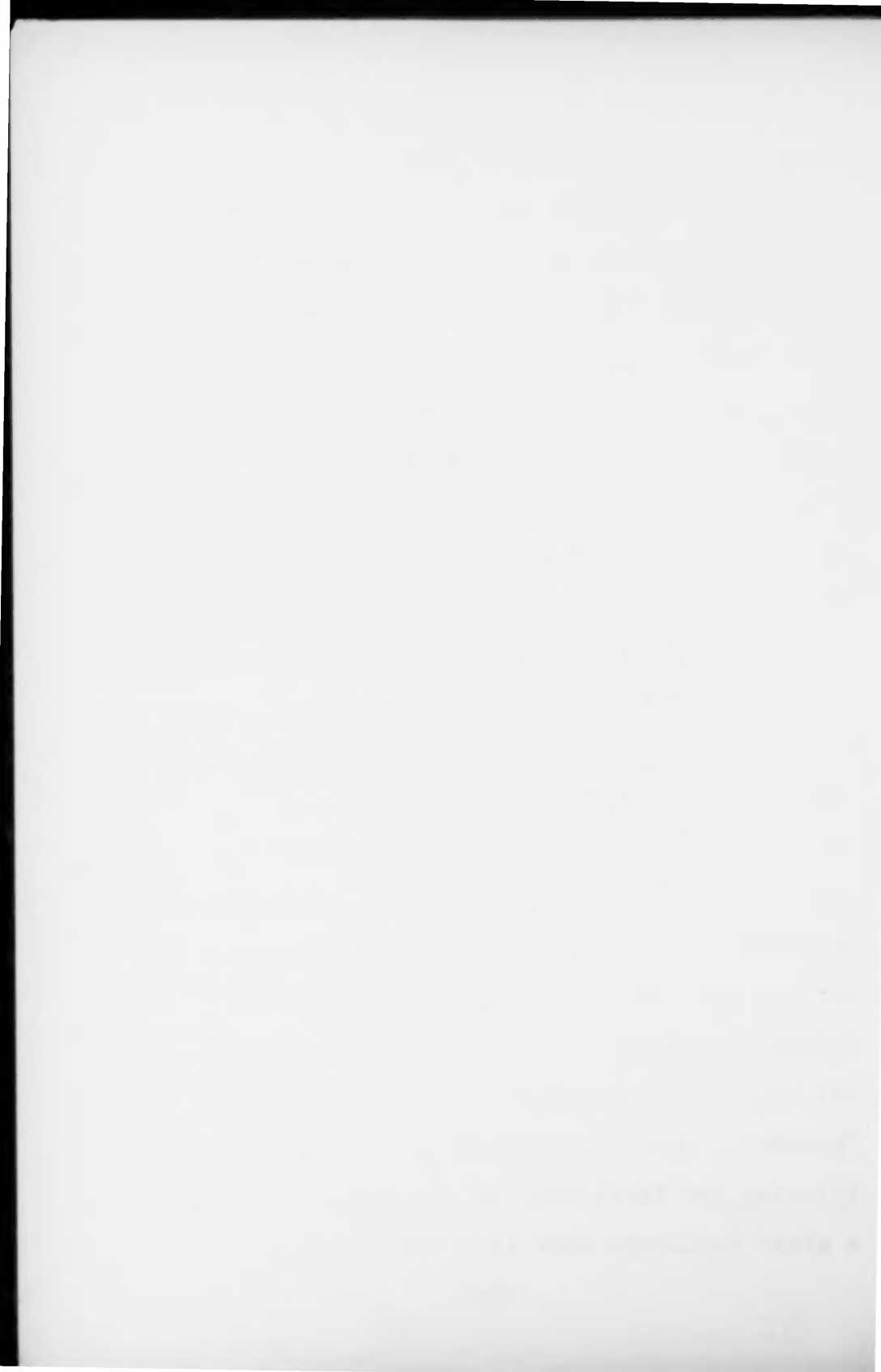
The present case deals with a composite of these recognized basic rights: State action directed against a class of persons who are defined not by the fact they belong to a particular religion, but by the fact that they are members of a religious hierarchy. This denial of access to the Courts is based not on economic grounds, but on the fact that



these persons belong to a peculiarly religious class, though not of any one given religion.

The denial of access to the Courts is thus based on the State's articulated interest with regard to the peculiar status of a class of religious persons. Yet the State, in the guise of protecting the freedom of religion generally, has attempted to justify it's denial of a basic right to a group who are distinguished by the nature of their religious affiliation by pointing to that affiliation.

The Petitioner recognizes that the limitation placed on the right of access by the State action is not of a broad scope: the Petitioner has not been prohibited from utilizing the Court system equally against defendants other than established Churches. But the fact that the Petitioner is a Priest necessarily entails that a great majority of his day-to-day dealings involve established Churches. Should a tortious situation arise injuring the Petitioner in the future there is a great likelihood that it's context will be



within an established Church. The Petitioner's peculiar position renders the effective range of the State prohibition much greater than it may first appear.

The Petitioner also recognizes that the cited State interest of protecting religious belief generally from State interference under the outlines of the First Amendment is a laudable objective. He does not propose that where his personal rights, or even the rights of Priests as a class, conflict with the right of the entire population to freely pursue their own religious beliefs that there should be any hesitation on the part of the Courts in finding justification for restricting the rights of the few in favor of the rights of the many.

However, the right of access to the Courts is, in and of itself, such a basic right that it's denial by the State should be subjected to strict scrutiny as to whether such denial serves a compelling State interest, and as to whether there is no other economical way for the State to achieve the same ends in serving



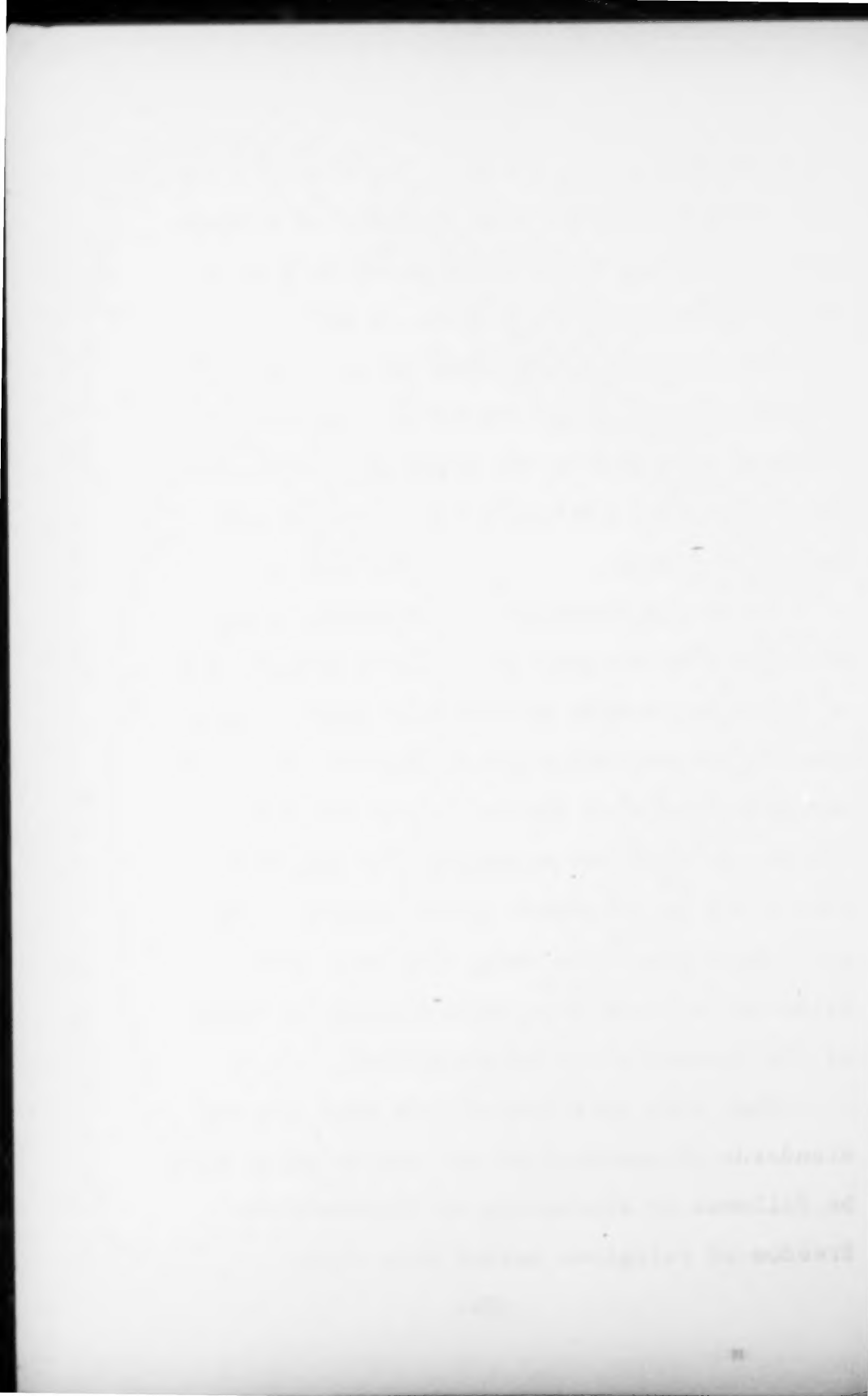


that interest.

Moreover, where such a denial of a basic and substantial right is directed only at a certain class, and that class is defined by it's religious status, there is all the more reason to give strict scrutiny to whether any interest advanced by the State as a basis for it's action will actually be served by the denial of rights.

It is the contention of the Petitioner that the present case is, in it's effect, one of first impression before this Court: this case is not primarily about whether the State may interfere with the religious beliefs of a Church, or with the workings of a Church in such a way as to affect those beliefs. Those particular questions have, the Petitioner believes, already been well-settled in favor of the freedom of religious belief.

What this case concerns is what are the standards of examination and review which must be followed in attempting to implement the freedom of religious belief from State



interference? When protecting the freedom of Religion involves denying an entire class of persons a basic Constitutional right, and when that class is defined by its peculiar religious condition, what are the standards of examination and review which are necessary before such a class may be deprived of such a right?

The Petitioner proposes that only the most strict and stringent standards of review are appropriate when determining if the freedom of Religion is protected by denying Priests the right to sue.

The Petitioner proposes that it is the duty of the State, if it is to deny him the right to sue in Court because he is a Priest, to most clearly and unequivocally demonstrate how, under the facts of the given matter, allowing the Petitioner a hearing on the merits of his case will require the Court to adjudicate a tenet or doctrine of Religious faith.

The Petitioner proposes that when a Court, as in the present case, is confronted with



denying a Plaintiff his day in Court, it must demonstrate a clearly reasoned approach, firmly based on the facts in the record, and not reach a conclusion founded on assumption or mischaracterization of fact, before it comes to the conclusion to deny such a basic right.

The requirement for stringency should be more compelling when, as here, the decision of the Court affects not just a single Plaintiff, but an entire class of persons, in denying the right of access to the Courts.

When the class of persons affected is defined by religious belief, the necessity of strict scrutiny should be unquestioned.

In denying the Petitioner his right to have the facts of his suit litigated on their merits, where the denial was based on the Petitioner's membership in a distinct class of persons defined by their religious belief, the lower Courts not only needed to cite a compelling State interest which would be served by denying such rights, but they had to demonstrate in the strictest manner possible how that



interest would be served, and why there was no other, less obtrusive, economically feasible way in which the same ends could be reached without denying the Petitioner and the class to which he belonged their basic right.

#### IV

The Lower Court Failed to Strictly Scrutinize or Explain the Factual Basis for It's Finding In This Matter That the Complained Of Intentional Torts Were Protected Behavior Under the First Amendment.

As is apparant from the opinion of the Appellate Court, which in effect was adopted by the Supreme Court of California by its denial of the Petition for Review, the basis for denial of jurisdiction was that the complained-of behavior was protected by the Religion clause of the First Amendment.

The distinction between what is protected ecclesiastical behavior and what is not has previously been addressed by this Court:

"That one performs a tort or commits a crime in the furtherance of a religious activity or as a part of a religious belief does not confer immunity upon such alleged wrongdoer.





The Constitutional guarantees of freedom of religion embody two concepts: freedom to believe and freedom to act. The first is absolute but, in the nature of these things, the second cannot be. Conduct remains subject to regulation for the protection of society."

-Cantwell v. Connecticut (1940)  
310 U.S. 296, 303-304; 60 S.Ct.  
900, 903; 84 L.Ed. 1213

"Whether or not such immunity exists depends, in part, on whether the adjudication of the claim would require a judicial determination of the validity of a religious belief."

-United States v. Ballard (1948)  
322 U.S. 78; 64 S.Ct. 882; 88 L.Ed.  
1148

It is clear that the First Amendment prohibits State action which would infringe on religious belief, and such prohibition is absolute. But there is no such prohibition against procedures which would interfere with or adjudicate mere acts that are claimed to have a religious basis. Only where the complained-of acts are so clearly intertwined with religious beliefs that to adjudicate whether the acts created liability would require a judicial determination of the



validity of a religious belief is such adjudication prohibited.

In the present matter the lower Courts are of the opinion that the complained-of intentional torts are so intertwined with religious beliefs that to adjudicate the questions presented by the Petitioner's complaint would necessarily require a decision as to the validity of those beliefs.

However, there has been no examination by the lower Courts as to exactly how the complained-of acts: defamation, invasion of privacy, and intentional infliction of emotional distress; involve any sort-of religious belief in the fact of their having been committed.

Rather, the lower Courts have expressed the view that, because the complained-of acts appear to have been committed in conjunction with administrative and disciplinary functions of the Church, it is presumed that there was a valid underlying religious motive for the commission of the acts.



It is assumed that the commission of the acts embodied a valid religious belief. It is assumed that the complained-of acts are in some way demonstrably proper administrative functions of a Bishop of the Roman Catholic Church. For these reasons further examination of the genesis of the acts would be improper because it might require the Courts to examine the validity of religious beliefs held by the Roman Catholic Church.

In the words of the Court of Appeal:

"When we know that torts such as those of which Higgins complains occurred as inseparable parts of a process of divestiture of priestly authority, we are most reluctant to sever them from the privileged aura of what might be called ecclesiastical exemption."

(emphasis in original)

-Original Appellate opinion, pg. 17a

"We know that the acts so taken were part and parcel of the Bishop's administration of his ecclesiastical functions."

-Original Appellate opinion, pg. 17a

With all due respect to the opinion of the Appellate Court, the record in this matter provides no basis for the assertion that the



Court knew, as a fact, that the complained-of actions occurred as part of an administrative process.

The record in this matter only indicates that the complained-of actions occurred one or two months after Bishop Maher acted to suspend the Petitioner's Priestly faculties. The record also indicates that the Petitioner and Bishop Maher had a long series of prior confrontations and disagreements over a number of matters pertaining to the Church. There is no evidence in the record, whatsoever, which indicates that the complained-of intentional torts occurred either at the same time as the "divestiture of priestly authority", or that they were performed by Bishop Maher as some legitimate part of his administration of his ecclesiastical functions.

Once again, with all due respect to the Appellate Court, the statement by that Court in it's opinion that it knew the intentional torts of defamation, invasion of privacy and





infliction of emotional distress occurred as "part and parcel" of an administrative function of the Church is an assumption unsupported by the record.

This gains greater import when it is considered that the Appellate Court admitted in its opinion that, were it not for the "genesis" of the complained-of actions in the "priest-bishop relationship", the allegations probably could not have been dismissed. (Ppg. -16a of original Appellate opinion). The perception that the complained-of acts occurred in conjunction with legitimate religious functions thereby granting a "privileged aura" to defamation, invasion of privacy and intentional infliction of emotional distress is therefore the only reason why the Petitioner's action was dismissed.

Indeed, it would appear that what is equivalent to State action, for the purposes of the 14th Amendment, denying the right to sue religious superiors, has been taken against all



Priests in the State of California on the basis of the Appellate Court asserting that it "knew" the complained-of actions occurred in an administrative context.

Given the serious results of that assertion, the Appellate Court was required to do more than give conclusory summaries of fact (which are demonstrably unsupported by the record) in support of its reasoning.

The Petitioner contends that, due to the fact that denial of access to the Courts constitutes a violation of both his rights, and the rights of the class to which he belongs, under the Fourteenth Amendment, he is entitled to a far more detailed and precise examination of the question of whether or not the complained-of actions were protected activity or not. Not only must a definite factual basis be cited for the assertion that the activities were in some way administrative functions, but an analysis should be provided as to why administrative functions are, as a class, protected Church activities. It is the assertion of the



Petitioner that the mere identification of some action as being in some way a part of an administrative function taken by a Church superior against his subordinate does not dispositively brand the action as being protected activity. The action must be shown to have been motivated by religious belief, in and of itself, before it becomes protected.

The Petitioner contends that the analysis his allegations have been afforded to date is insufficient to satisfy the standards of scrutiny required to justify or support the denial of rights under the Fourteenth Amendment which the action of the lower Courts in dismissing his complaint constitutes.

It is the contention of the Petitioner that the lower Courts need guidance from this Court as to the degree of scrutiny required before it may be concluded that intentional torts such as those complained of can be found to be protected activity under the First Amendment to the Constitution. It is the



contention of the Petitioner that where, as here, such a finding of protected activity has the result of blocking access of a class, or an individual, to the civil Courts based upon a classification using religious criteria, a degree of scrutiny and examination is required which is sufficient to clearly demonstrate how the acts in question are considered to have arisen out of, or in the direct service of, religious beliefs.

#### CONCLUSION

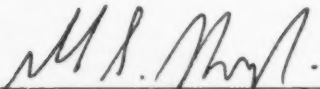
For these various reasons, this petition for certiorari should be granted.

If the Petitioner is correct in urging that the standards of review in this matter required strict scrutiny, and that the opinions of the lower Courts do not demonstrate this level of analysis, this matter should be remanded to the Court of original jurisdiction for appropriate disposition in conformance with the opinion of this Court.





Respectfully Submitted,

By   
\_\_\_\_\_  
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Counsel for Petitioner

December 26, 1989



## APPENDIX



CERTIFIED FOR PUBLICATION  
COURT OF APPEAL, FOURTH APPELLATE DISTRICT  
DIVISION ONE  
STATE OF CALIFORNIA

MICHAEL HIGGINS,	)	
	)	
Plaintiff and	)	
Appellant,	)	
	)	
v.	)	
	)	
LEO T. MAHER et al;	)	D007461
	)	
Defendants and	)	(Super. Ct. No.
Respondents.	)	587931)

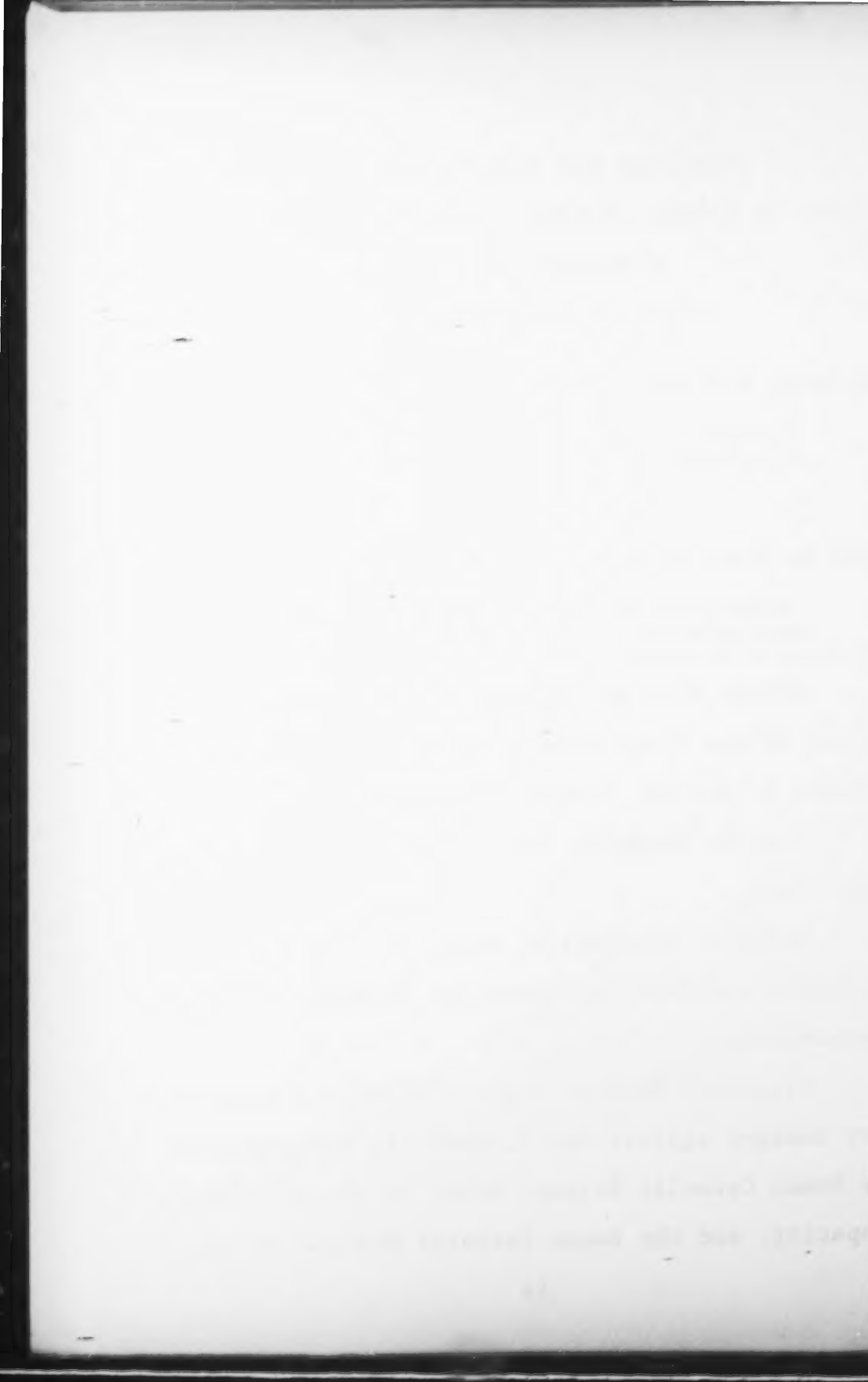
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APPEAL from a judgment of the Superior Court of San Diego County, Arthur W. Jones and Edward T. Butler, Judges. Affirmed.

Glen S. Margolis for Plaintiff and Appellant.

McInnis, Fitzgerald, Rees, Sharkey & McIntyre and Dave Carothers for Defendants and Respondents.

Plaintiff Michael Higgins filed a complaint for damages against Leo T. Maher in his capacity as Roman Catholic Bishop, Maher in his individual capacity, and the Roman Catholic Diocese of San



Diego. The general demurrer of all defendants was sustained without leave to amend, the Court concluding that the matters embraced by the complaint were ecclesiastical and not within the jurisdiction of civil authority. Plaintiff appeals.

The parties do not disagree respecting the black letter law of civil intrusion into the regulation and administration of affairs involving churches. The free exercise of religion is guaranteed by both the federal and state constitutions (U.S. Const., Amend. I; Cal. Const., art I, § 4.) The civil courts will therefore not intrude into the church's governance of "religious" or "ecclesiastical" matters, such as theological controversy, church discipline, ecclesiastical government, or the conformity of members to standards of morality. Recognizing that churches, their congregations and hierarchy exist and function within the civil community, however, it is acknowledged that they are as amenable as other societal entities to rules governing property rights, torts, and





criminal conduct. (Watson v. Jones (1872) 80 U.S. 679, 732-733.)

The difficulty comes in determining whether a particular dispute is "ecclesiastical" or simply a civil law controversy in which church officials happen to be involved. That is the issue in this case. Plaintiff contends his several causes of action are garden-variety torts which just happen to involve the Bishop. Defendants assert that the dispute arises from a peculiarly ecclesiastical issue, and that framing the allegations in the terminology of common law torts cannot clothe the civil courts with jurisdiction.

In that the court's ruling was on a demurrer, we are limited in our factual assumptions to the plaintiff's complaint. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading § 895, pp. 334-337.) Accepting the allegations of the complaint as true, we summarize the facts alleged as follows:

Higgins was, and is, a priest of the Roman Catholic Church. In 1978 he was appointed by



Bishop Maher as an administrator of a church in the San Diego Diocese. Over a period of some years he reported financial improprieties in his church, and also in the Bishop's staff, to the Bishop, asking that appropriate remedial steps be taken. No action was taken. In April of 1980 the Bishop confronted Higgins with reports that he had received of Higgin's "social misconduct," contained in two letters to the Bishop. Allowed to examine only one of these letters, Higgins determined it was a forgery of which Maher was aware. As a result of these false accusations, Higgins suffered mental and emotional distress.

Higgins attempted to resolve his grievance concerning the false accusations through administrative procedures allowed by canon law, including a communication to the Holy See in Rome. The only result of this effort was a denunciation by Bishop Maher, stating that Higgin's correspondence contained "lies."

In January of 1982 the Bishop without prior warning confronted Higgins in the presence



of four other priests and "suspended him A Divinis, Ex Conscientia Bene Informata, " the effect of which was to remove Higgins from his church post and responsibilities. This action was improper and violative of canon law because it should have been accomplished confidentially, rather than in the presence of other priests, and Higgin's suspension should have come through the Holy See rather than directly from the Bishop.

In a memorandum authored by the Bishop (the use or publication of which is not alleged) the Bishop stated: "Monsignor Higgins' actions of solicitation ...on many other occasions, have caused grave scandal ...he has frequently solicited people ...the number is numerous and the scandal has been grave." The Bishop never attempted to learn "Plaintiff's side of the alleged incident." In May of 1985, the parishoner who allegedly had made the complaint of social misconduct signed a statement that Higgins "never once made a pass and shouldn't have his name dragged through the mud on pure



speculation."

Thereafter, upon persuasion from the Church, Higgins underwent a program of rehabilitation with a therapy-oriented organization within the Church called Paracletes. During this treatment Higgins was given various drugs which caused him to become nervous and lose much of his reasoning ability. At one time one of the priests with Paracletes diagnosed him as a degenerative schizophrenic. He was treated with electroshock therapy. Although plaintiff had given no permission to release information about his treatment, someone at Paracletes revealed the information about his shock treatment to priests not associated with Paracletes.

After release from Paracletes Higgins spent time in a diocese in Minnesota, and in September of 1985 obtained a position as Chaplain in a church hospital in Illinois. He lost this position, however, because the Superior General of Paracletes, without Higgins' consent, made known to the Illinois authorities





Higgins' past treatment. Higgins alleges that the continued publication of his personal psychiatric records was an organized campaign to discredit him and to destroy his ability to obtain employment within the church. Bishop Maher, he alleges, was in communication with Paracletes and aware of the unauthorized release of information.

In 1983 a new code of canon law was published, the effect of which was to abrogate the rules under which Higgins had been suspended in January of 1982. This had the effect of automatically lifting his suspension. In any event, the suspension would have terminated automatically in three years, or at the latest in January of 1985. In April of 1987 Higgins attempted to resume his career as priest in San Diego. He was prevented from doing so, however, by the Judicial Vicar of the San Diego Diocese, who on behalf of Bishop Maher asserted Higgins had been removed as a Priest. This new publication of Higgins' suspension was done without adherence to the procedures of canon



law, was without prior warning or explanation, and constituted "a new termination of employment." Higgins has appealed this action with the church, exhausting his church remedies, but he has been afforded no relief.

In June of 1987, Higgins alleges, in an effort to drive him from the Diocese, false statements were published by members of the Bishop's staff to other priests concerning "unfounded social allegations," Higgins' prior treatment at Paracletes, his involvement in one or more assaults in the recent past, and his dangerous tendencies.

Following this detailed history, Higgins' complaint contains causes of action incorporating the history and asserting that various of its facets constitute common law torts. The publication of the details of Higgins' confidential treatment at Paracletes is characterized as an invasion of privacy. The publication of false accusations of assault and social misconduct is the basis for a cause of action for defamation. In what would appear to



be a cause of action in tort rather than contract, the defendants are accused of wrongful termination. In a related and similar cause of action the termination is characterized as a breach of the covenant of good faith and fair dealing. Finally, the church's and Bishop's actions are alleged to constitute the negligent as well as the intentional infliction of emotional distress.

#### DISCUSSION

We deal first with the causes of action directly related to termination of Higgin's position as an employee or official of the church. Where a schism has developed within a church, resulting in dispute as to who holds ultimate authority for congregational or corporate decisions, civil courts are unavoidably put to the task of identifying the true or ultimate authority. (Rosicrucian Fellow v. Rosicrucian Etc. Ch. (1952) 39 Cal.2d 121, 131-135.) To do otherwise would be to deny "all legal protection to churches and



[allow] church disputes to be settled by physical force." (Laycock, Towards A General Theory of Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy (1981) 81 Colum.L.Rev. 1373, 1413.) This is true even though the dispute centers around the employment of the preacher. (See, e.g., Providence Baptist Church v. Superior Court (1952) 40 Cal.2d 55, 63-64.) That problem does not, however, impact this case. Higgins affirmatively asserts that the defendants constitute the official church, and further that he has attempted to utilize and in fact has exhausted his church's judicial and administrative remedies.

In the wrongful termination and breach of implied covenant causes of action, therefore, we start with the assumption of termination by the legally constituted authority of the Church, but by a procedure contrary to church law and regulations, and for improper, false and fraudulent motives. Higgins asks us to right these wrongs even as the same would be





corrected were his employer not the church, but an ordinary civil entity.

We cannot do this. The authorities are next to unanimous in concluding that civil courts may not involve themselves in reviewing the termination of clergy for theological or disciplinary reasons. In Maxwell v. Brougher (1950) 99 Cal.App.2d 824, the issue was the propriety of the church's majority membership's retaining its preacher in the face of charges of malfeasance. Declining to become involved in what the court concluded was an internal church matter, the court stated at page 826:

"Where the subject matter of a dispute is purely ecclesiastical in its character, a matter which concerns church discipline or the conformity of its members to the standard of morals required of them, the decision of the church tribunal will not be interfered with by the secular courts either by reviewing their acts or by directing them to proceed in a certain manner or, in fact, to proceed at all. If the civil courts undertook so to do they would deprive such bodies of their right of construing their own church laws including doctrinal theology and the uses and customs of every religious denomination."



The removal of clergy may, of course, result in disputes over property. Based upon its obligation under civil law to protect property rights, the court in Providence Baptist Church v. Superior Court, supra, 40 Cal.2d 55, sanctioned court appointment of a referee to hold an election among church members. "As long as civil or property rights are involved, the courts will entertain jurisdiction of controversies in religious bodies although some ecclesiastical matters are incidentally involved." (id. at p. 60.) However, while undertaking jurisdiction on the ground of protection of property rights, the court approved the rule stated in Watson v. Jones, supra, 80 U.S. 679, that "the supervisory power of the civil tribunals may not be invoked when the only property involved is the loss of clerical office and the salary incident thereto." (Providence Baptist Church v. Superior Court, supra, 40 Cal.2d 55 at p. 62, quoting Dyer v. Superior Court (1928) 94 Cal.



App. 260 at p. 269.)

Instructive in this area are cases dealing with conflicts between the equal employment opportunity requirements of Title VII, United States Code, and rules and policies of the church. McClure v. Salvation Army (5th Cir. 1972) 460 F.2d 553 involved a plaintiff employed in a religious capacity by the Salvation Army, an entity found by the court to be a "church". (Id. at p. 554.) The issue was whether the secular court was precluded from applying the requirements of Title VII to the church's alleged wrongful termination of plaintiff. In precluding relief, the court stated:

"The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to



perform in the furtherance of the religious mission of the church." (McClure v. Salvation Army, *supra*, at pp. 558, 559.)

An attempt to apply Title VII rules to the church's employment practices would, the court stated:

"involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times been proclaimed to be matters of a singular ecclesiastical concern. Control of strictly ecclesiastical matters could easily pass from the church to the State. The church would then be without the power to decide for itself, free from State interference, matters of church administration and government." (Id. at p. 560.)

The teaching of this line of authority is that secular courts will not attempt to right wrongs related to the hiring, firing, discipline or administration of clergy. Implicit in this statement of the rule is the acknowledgement that such wrongs may exist, that they may be severe, and that the administration of the church itself may be inadequate to provide a remedy. The preservation of the free exercise of





religion is deemed so important a principle as to overshadow the inequities which may result from its liberal application. In our society, jealous as it is of separation of church and state, one who enters the clergy forfeits the protection of the civil authorities in terms of job rights. Father Higgins' causes of action for loss of position, for loss of salary and benefits, and for the related personal stress and humiliation the same may have caused, were properly dismissed.

This conclusion does not, however, end our deliberations. While a man of the cloth may give up his civil rights related to employment, Higgins contends it does not follow that he waives recourse for the common law wrongs he may suffer. Commission of a crime, such as murder, will remain a matter for civil authorities regardless of the tenets of a religious organization whose members may perpetrate the offense. (See Watson v. Jones, supra, 80 U.S. 679 at p. 733.) The commission of a common



law tort in the name of or under the auspices of a church does not lessen its culpability. (O'Moore v. Driscoll (1933) 135 Cal.App. 770, 774; Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1114, 1116-1117; Walker v. Superior Court (1988) 47 Cal.3d 112.) Higgins has pleaded the essential elements of the torts of invasion of privacy, defamation, and the intentional and negligent infliction of emotional distress. His pleading is plain and direct in terms of accusing the Bishop and other church hierarchy of unwarranted and malicious conduct which caused him severe damage. Had these allegations been set forth without the preamble showing their genesis in the priest-bishop relationship, it is doubtful they could have been dismissed on demurrer.

Our perplexity is the result of the extent and detail of Higgins' pleading. We know not only that the Bishop has defamed Higgins, violated his privacy and caused him emotional distress. We know that the acts so taken were



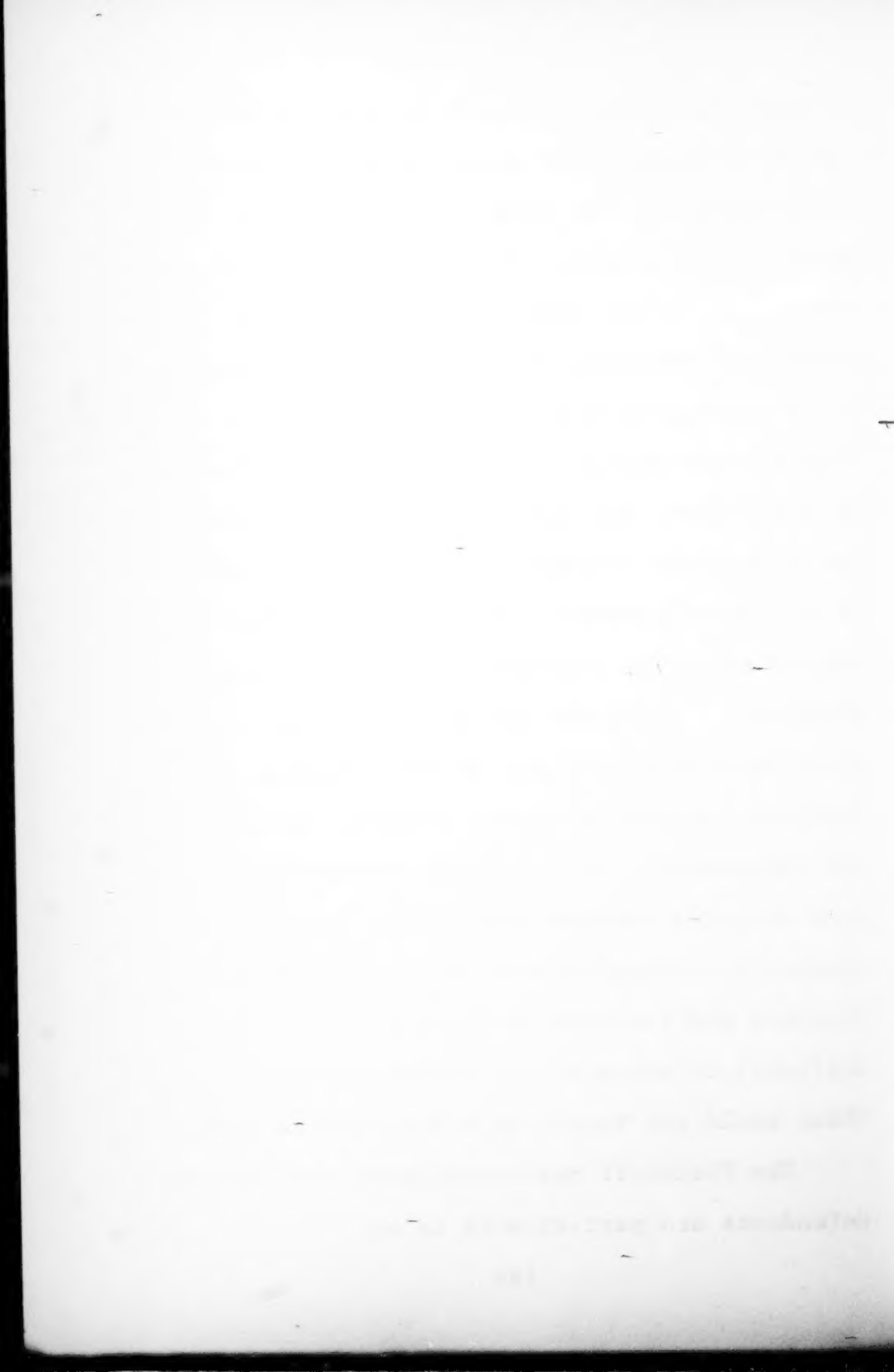
part and parcel of the Bishop's administration of his ecclesiastical functions. We have established, above, that the Bishop is answerable only to canonical authorities for his misdeeds in the wrongful treatment of a priest, in terms of ecclesiastical as distinguished from civil spheres. If, as part of procedures resulting in the defrocking of a priest, the Bishop makes false accusations, we restrain the civil authorities from becoming involved. The accusations, false or not, pertain directly to the ecclesiastical functions of the church, and we deign not to become involved. When we know that torts such as those of which Higgins complains occurred as inseparable parts of a process of divestiture of priestly authority, we are most reluctant to sever them from the privileged aura of what might be called ecclesiastical exemption.

Regardless of the church's motives or objectives, or the circumstances giving rise, we would probably agree that torts such as



battery, false imprisonment or conversion cannot be perpetrated upon its members with civil impunity. We find, however, that at least in the context of Higgins' averments, the torts recited are simply too close to the peculiarly religious aspects of the transaction to be segregated and treated separately -- as simple civil wrongs. The making of accusations of misconduct; the discussion of same within the order; the recommendation of psychological or medical treatment; the infliction, whether intentionally or negligently, of emotional distress -- these are all activities and results which will often, if not usually, attend the difficult process by which priestly faculties are terminated. If our civil courts enter upon disputes between bishops and priests because of allegations of defamation, mental distress and invasion of privacy, it is difficult to conceive the termination case which could not result in a sustainable lawsuit.

The Plaintiff has established that all the defendants are participants in an





ecclesiastical undertaking. He avers that the religious order is an established one with recognized structure of authority and judicature. His complaint arises as a result of his employment in this canonical establishment, and the detailed history of his misfortune relates most specifically to the inner workings of his church. Under these circumstances, we hold that the plaintiff cannot, by separate statement and distinct characterization of divisible aspects of the transaction, achieve articulation of common law torts sufficient to overcome our preclusion from meddling in the ecclesiastical authority of the church.

#### DISPOSITION

#### CERTIFIED FOR PUBLICATION

The judgment of the trial court is affirmed.

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FROEHLICH, J.

WE CONCUR:

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TODD, Acting P.J.

-S-

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HUFFMAN, J.



## STATE OF CALIFORNIA

D007461

(Super. Ct. No.  
587931)

LEO T. MAHER et al;

### Defendants and Respondents.

The petition for rehearing is denied.

-5-

TODD, Acting P.J.

FILED JUNE 12, 1989



ORDER DENYING REVIEW  
AFTER JUDGMENT BY THE COURT OF APPEAL  
Fourth Appellate District, Division One  
No. D007461, S010932  
IN THE SUPREME COURT OF THE STATE OF  
CALIFORNIA  
IN BANK

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MICHAEL HIGGINS, Appellant

v.

LEO T. MAHER Et Al. Respondents

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Appellant's petition for review is DENIED.

Kaufman, J., is of the opinion the petition should be granted.

EAGLESON, J.  
Acting Chief Justice

FILED AUGUST 10, 1989